IN THE

Supreme Court of the United States

October Term, 1972

Nos. 72-269, 72-270, 72-271

ARTHUR LEVITT, as Comptroller of the State of New York, and EWALD B. NYQUIST, as Commissioner of Education of the State of New York,
Appellants,

v.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY *et al.*,
Appellees;

WARREN M. ANDERSON, as Majority Leader and President pro tem of the New York State Senate
Appellant,

v.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY *et al.*,
Appellees;

CATHEDRAL ACADEMY *et al.*,
Appellants,

v.

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY *et al.*,
Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF for APPELLANT WARREN M. ANDERSON

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POINT I

Mandated Services Aid is Not Only Expressly Authorized Under the "Blaine Amendment," the Nature and Spirit of this Aid Has Been the Policy of the State of New York Predating Even the Constitution of this Nation

Basic to Appellee's argument is that the State's program of Mandated Services Aid requires "comprehensive, discriminating, continuing state surveillance," which violates the Establishment Clause of the First Amendment. This position ignores the constitutional and historical basis for such aid.

The so-called "Blaine Amendment," Article XI, section 3, of the New York State Constitution, is often cited as authority for prohibiting the expenditure of public funds in aid of denominational schools. It expressly authorizes such aid, however, . . . "for examination or inspection" . . . of such schools. No better authority can be found for this assertion than the report of the Committee that wrote the "Blaine Amendment" in 1894. On August 23, 1894 Mr. Frederick W. Holls, Chairman of the Committee on Education and the Funds Pertaining Thereto, submitted the Committee's proposal and its report to the Constitutional Convention.

The Report states:

> There is one exceptional case provided for in the first sentence of this section in which public money may be used in connection with a sectarian school or institution of learning, and that is contained in the words 'otherwise than for examination or inspection of such institutions.' *This exception, in our opinion, in no way affects the principle, except in so far as it emphasizes even more strongly the interest and latent power of the State with regard to all institutions of learning.* Without the words last quoted the question might be raised, whether the section would not prohibit even the trifling expenditure necessary for the inspection and

examination of denominational schools which are now connected with the University of the State of New York, and this question necessarily raises the broader one, as to whether this connection should be maintained or prohibited as a violation of the principle sought to be established in this article.[1] (emphasis added)

The Committee then goes on to say that the proposed amendment will prohibit the current *per capita* allowance from the State Literature Fund for every student who passed the Regents' examinations.

This, however, by no means necessarily implies that the supervision of the University and the system of regular examinations by which the efficiency of these institutions is tested, must be given up. . . . So far from injuring the educational system of the State, we are of opinion that the latter will be largely benefited by such a course, which extends the uniformity of excellence maintained by State institutions to those under private and sectarian control, and which, by causing the adoption, in many instances, of modern and thoroughly American text-books and methods, necessarily tends to break down the barriers of prejudice by which our people may be divided. *That there may be no question of the authority of the University to continue these examinations, the words last-above quoted have been introduced into this section.* (emphasis added)

The issue of aid to sectarian institutions was probably the most volatile issue at the Constitutional Convention of 1894. Yet in the one hundred and nineteen pages of heated debate the powerful majority, which crushed aid in general to sectarian schools, did not even question the exception for "examination and inspection" because it was so fundamental to this State's public policy.

Mr. Justice Holmes once commented, "A page of history is

[1] Revised record of the New York State Constitutional Convention, 1894. Document No. 62, pp. 706, 707.

worth a volume of logic." *New York Trust Co. v. Eisner,* 256 U.S. 345, 349 (1921). The public policy of the State of New York has been and remains that all children of this state, regardless of how or where they are educated, are to receive a standard quality education and this is to be insured by the State. On April 13, 1787, the legislature passed an act creating the Regents of the University of the State of New York.[2] The Act authorized and required the regents "to visit and inspect all the colleges, academies[3] and schools which are or may be established in this State, examine into the status and system of education and discipline therein, and make a yearly report thereof." Charles Z. Lincoln, who wrote a constitutional history of New York State, states in his treatise with regard to this statute, "The meaning of the term 'schools' was originally somewhat uncertain; but in view of the fact that there were then no public schools, it was doubtless intended to include schools other than colleges and academies which might be thereafter established; but by the new legislation,[4] the term has been given an enlarged meaning, and by legislative construction is made to include all schools, public or private, which are subject to state supervision."[5]

The powers of supervision and inspection by the Regents was exercised throughout the nineteenth century and has continued to the present. "In his annual message to the legislature on January 1, 1839, Governor William H. Seward referred

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[2] New York Laws, ch. 82 (1787).

[3] Dr. Edward Connors in a dissertation on Church-State relationships in Education in the State of New York published in the Catholic University of America Press, Vol. XVI, No. 2, 1951, pp. 97-103, defined the academy in Nineteenth Century New York. He observed that inasmuch as the public high school did not come into existence in New York until 1850, the academies remained the principal secondary schools throughout the period, being surpassed by the latter only after 1875.

[4] Lincoln's reference to the "new legislation" concerned a 1904 law which created a commissioner of education. New York Laws, ch. 40 (1904).

[5] Lincoln, C., "The Constitutional History of New York", Vol. IV, The Lawyers Co-op Pub. Co., Rochester, 1906, page 717.

to certain laxities in the inspection and supervision both in the common schools and in the colleges and academies . . .".[6]

In 1854, the legislature passed an act creating a state superintendent of public instruction. Among his duties were the visitation and inspection of the "common schools, academies and other literary institutions of the state . . ."[7] Charles Lincoln said of this act:

> It will be observed that the act of 1854 required the superintendent to visit the academies and other literary institutions of the state, and to inquire into their course of study, management, and discipline. To this extent the suggestion made in 1835 was adopted in 1854, and the superintendent was given the right of visitation and inspection of all schools. *By this he had the right of visitation of institutions under the general supervision of the regents.*[8] (emphasis added)

The Regents examinations system in New York State began in 1865 with a plan of entrance or "preliminary" examinations for pupils wishing to attend the academies. "These examinations were immediately effective in fostering high standards of instruction and they were extended upward into the regular work of the secondary schools in the form of academic Regents examinations (1878) and downward into the elementary grades in the form of grade examinations (1889)."[9] Harlan Hoyt Horner, former Associate Commissioner for Higher and Professional Education, said that: . . . these examinations have influenced the character of the educational program and have raised the standards of instruction as well as more nearly equalized educational opportunity as between the wealthy and

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[6] "Education in New York State 1784-1954", Compiled and Edited by Harlan Hoyt Horner, The University of the State of New York, "The State Education Department", Albany, 1954.

[7] New York Laws, ch. 97 (1854).

[8] Lincoln, Const. Hist. of N.Y., Vol. III, p. 546. The "suggestion made in 1835" was a recommendation of the Assembly Committee on Education for an *ex officio* chancellor of the State University to inspect all schools.

[9] Ed. in N.Y. State, Horner p. 70.

less fortunate school districts, as between urban and rural areas, and as between public and nonpublic high schools.[10]

Mandated Services Aid is merely a continuation of what New York State has been doing for all its youth for nearly two hundred years. In *Walz v. Tax Commission,* 397 U.S. 664 (1970), at pg. 678, Chief Justice Burger noted:

> It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice of according the exemption to churches, openly and by affirmative state action, not covertly or by state inaction, is not something lightly to be cast aside.

The legislative purpose of Mandated Services Aid is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility. The historical significance of mandated services certainly mutes any charge that it excessively entangles the state with religion.

The examination and inspection by the State of all schools has led to uniform high quality education guaranteed to all citizens of New York. Mandated services should not be lightly cast aside because its demise can only hurt the State's educational program.

> The general principle deductible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmental established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.[11]

Mandated services continues the policy of benevolent neutrality begun in 1787 and clearly provided for by the "Blaine Amendment."

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[10] Ibid. p. 60.
[11] 397 U.S. 664 (1970), at pg. 669.

Conclusion

The Mandated Services Act is expressly authorized under the "Blaine Amendment" and is a continuation of the long-standing policy of the State of New York to supervise the instruction of students in all institutions of learning in order to maintain a quality education for all children attending schools in the State. The judgment appealed from should be reversed with a direction to the District Court to dismiss the complaint.

Dated: March 5, 1973

Respectfully submitted,

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